No. 83-1444

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MCDERMOTT INCORPORATED, MCDERMOTT INTERNATIONAL, INC., BROWN & ROOT, INC., and HALLIBURTON COMPANY,
Petitioners,

—against—

EXXON CORPORATION, ET AL.,
Respondents.

IN RE MCDERMOTT INCORPORATED, MCDERMOTT INTERNATIONAL, INC., BROWN & ROOT, INC., and HALLIBURTON COMPANY,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI OR, IN THE ALTERNATIVE, A COMMON LAW WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents:

American Independent Oil Company; American Natural Gas Production Company; American Petrofina Company of Texas; American Petrofina Exploration Company; Aminoil Development Inc.; Aminoil International Inc.; Aminoil U.S.A., Inc.; Amoco Egypt Oil Company; Amoco (U.K.) Exploration Company; Amoco Iran Oil Company; Amoco Norway Oil Company; Amoco Production Company; Amoco Trinidad Oil Company; Arabian American Oil Company; Aramco Overseas Company; Aramco Services Company; Arco British Limited; Arco Exploration, Inc.; Arco Oil Producing, Inc.; Atlantic Richfield Company; Atlantic Richfield Indonesia, Inc.; BP Alaska, Inc.; The British Petroleum Company Ltd.; BP Petroleum Development Ltd.; BP Trading Ltd.; Cabinda Gulf Oil Company; Carribean Gulf Refining Corporation; Clark Oil Producing Company; Conoco Inc.; The Dow Chemical Company; Dow Chemical International, Ltd.; Drillamex, Inc.; El Paso Natural Gas Company; Esso Exploration & Production Australia, Inc.; Esso Production Malaysia, Inc.; Exxon Corporation; Exxon Pipeline Company; Farmland Industries, Inc.; Finadel, Inc.; Gas Producing Enterprises, Inc.; Herbert I. Goodman (trustee for Gulf Asian Terminals Inc.); Gulf Kuwait Company; Gulf (U.K.) Offshore Investments Ltd.; Gulf Oil Company (Nigeria) Ltd.; Gulf Oil Company of Gabon; Gulf Oil Corporation; Gulf Oil Terminals (Ireland) Ltd.; Gulf of Suez Petroleum Company; Gulf Refining Company; Mene Grande Oil Company; Mineracao e Quimica do Nordeste, S.A.; Mobil Eugene Island Pipeline Company; Mobil G-C Corporation; Mobil Oil Exploration & Producing Southwest, Inc.; Mobil Oil Corporation; Norsk Hydro a.s.; Norsk Hydro Produksjon a.s.; The Northwestern Mutual Life Insurance Company; The Offshore Company; Pecten Cameroon; Pecten Malaysia Company; Petroleos Mexicanos; Phillips Petroleum Company; Phillips Petroleum Company, Norway; Shell Explorer Ltd.; Shell Oil Company; Shell Pipe Line Corporation; Signal Oil of Louisiana, Inc.; Sonat Exploration Company; Taranaki Offshore Petroleum Company, Ltd.; Terra Resources, Inc.; Valero Energy Corporation; Wintershall Oil & Gas Company; Zaire Gulf Oil Company.

Questions Presented

1. Is the assertion of the Fifth Amendment privilege by a non-party witness in a civil case admissible as "evidence" of the "facts" asserted in the unanswered question?

2. Where, in an effort to avoid a retrial of perhaps the largest and most complex private antitrust litigation in history, the district court certified its ruling on the admissibility of Fifth Amendment invocations for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), did the court of appeals abuse its discretion in denying leave to appeal because the district court did not formally recite the text of section 1292(b) in its order granting certification, while at the same time indicating that the district court should not issue a new certificate complying with this requirement?

Parties Below

The parties to this action in the Court below were:

Defendants-Petitioners:

Brown & Root, Inc., McDermott Incorporated, McDermott International, Inc., and Halliburton Company.

Plaintiffs-Respondents:

American Independent Oil Company; American Petrofina Company of Texas; American Petrofina Exploration Company; Aminoil Development Inc.; Aminoil International Inc.; Aminoil U.S.A., Inc.; Amoco Egypt Oil Company; Amoco (U.K.) Exploration Company; Amoco Iran Oil Company; Amoco Norway Oil Company; Amoco Production Company; Amoco Trinidad Oil Company; Arabian American Oil Company; Aramco Overseas Company; Aramco Services Company; Arco British Limited; Arco Exploration, Inc.; Arco Oil Producing, Inc.; Atlantic Richfield Company; Atlantic Richfield Indonesia, Inc.; BP Alaska, Inc.; The British Petroleum Company Ltd.; BP Petroleum Development Ltd.; BP Trading Ltd.; Cabinda Gulf Oil Company; Carribean Gulf Refining Corporation; Clark Oil Producing Company; Conoco Inc.; The Dow Chemical Company; Dow Chemical International, Ltd.; Drillamex, Inc.; Esso Exploration & Production Australia, Inc.; Esso Production Malaysia, Inc.; Exxon Corporation; Exxon Pipeline Company; Farmland Industries, Inc.; Finadel, Inc.; Florida Exploration Company (successor in interest to Florida Gas Exploration Company); Freeport Minerals Company (acting by and through its division Freeport Sulphur Company); Freeport Oil Company; Gas Producing Enterprises, Inc.; Herbert I. Goodman (trustee for Gulf Asian Terminals Inc.); Gulf Kuwait Company; Gulf (U.K.) Offshore Investments Ltd.; Gulf Oil Company (Nigeria) Ltd.; Gulf Oil Company of Gabon; Gulf Oil Corporation; Gulf Oil Terminals (Ireland) Ltd.; Gulf of Suez Petroleum Company; Gulf Refining Company; Home Petroleum Corporation; Koch Industries,

Inc.; Mene Grande Oil Company; Mineracao e Quimica do Nordeste, S.A.; Mobil Eugene Island Pipeline Company; Mobil G-C Corporation; Mobil Oil Exploration & Producing Southwest, Inc.; Mobil Oil Corporation; Norsk Hydro a.s.; Norsk Hydro Produksjon a.s.; The Northwestern Mutual Life Insurance Company; Pecten Cameroon; Pecten Malaysia Company; Petroleos Mexicanos; Phillips Petroleum Company; Phillips Petroleum Company, Norway; Sante Fe Energy Company; Santa Fe Industries, Inc.; Santa Fe Natural Resources, Inc.; Shell Explorer Ltd.; Shell Oil Company; Shell Pipe Line Corporation; Signal Oil of Louisiana, Inc.; Taranaki Offshore Petroleum Company, Ltd.; Terra Resources, Inc.; Valero Energy Corporation; Winterhall Oil & Gas Company; Zaire Gulf Oil Company.

TABLE OF CONTENTS

PAGE

Questions Presented i

Parties Below ii

Table of Authorities vi

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions and Rules 2

Statement of the Case 2

The Litigation 2

The Claims of Privilege and Plaintiffs' Proposed Use of Them 3

The Proceedings Below 5

Reasons For Granting the Writ 7

I. The Lower Courts Have Mistakenly Interpreted *Baxter* v. *Palmigiano* to Permit an Inference of Guilt, and of Specific Facts, from the Invocation of the Fifth Amendment by Non-Parties 7

II. It is Imperative That the District Court's Ruling be Reviewed Now to Prevent the Massive Waste of Resources, and the Negative Reflection on the Judicial Process, That a Retrial Would Entail 13

Conclusion 18

PAGE

Appendix 1A

Order of the Fifth Circuit, filed January 26, 1984 ... 1A

Memorandum Decision of the Fifth Circuit, filed January 26, 1984 ..... 2A

Order of the District Court Granting Motion for Certification, dated November 22, 1983, filed November 22, 1983 ..... 8A

Order of the District Court on the Admissibility of Non-Party Witnesses' Fifth Amendment Invocations, dated October 20, 1983, filed October 21, 1983 9A

Ruling of the Magistrate on the Admissibility of Witnesses' Fifth Amendment Invocations, dated August 1, 1983, filed August 1, 1983 ..... 10A

Appendix of Constitutional and Statutory Provisions and Rules 1S

Amendment V of the Constitution of the United States 1S

Relevant Provisions of the Judicial Code 1S

Proposed Rule 513 of the Federal Rules of Evidence 2S

TABLE OF AUTHORITIES

Cases:	PAGE
Baxter v. *Palmigiano*, 425 U.S. 308 (1976)	7-8, 17
Brink's Inc. v. *City of New York*, 717 F.2d 700 (2d Cir. 1983)	7n, 12
In re Corrugated Container Antitrust Litigation, Appeal of John Conboy, 661 F.2d 1145 (7th Cir. 1981)	9n
In re Corrugated Container Antitrust Litigation, Appeal of John Conboy, 655 F.2d 748, *rev'd en banc*, 661 F.2d 1145 (7th Cir. 1981)	9n
Depew v. *Hanover Insurance Co.*, 73 F.R.D. 101 (E.D. Tenn. 1976)	8n
Frierson v. *McIntyre*, 151 F. Supp. 5, 6-7 (W.D. Va. 1953)	8n
Gardner v. *Broderick*, 392 U.S. 273 (1968)	11
Garner v. *Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971)	14n
In re Heddendorf, 263 F.2d 887 (1st Cir. 1959)	15n
Hoffman v. *United States*, 341 U.S. 479 (1951)	11n, 12
House v. *Mayo*, 324 U.S. 42 (1945)	17n
Katz v. *Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974)	14n
Lionti v. *Lloyd's Insurance Co.*, 709 F.2d 237 (3d Cir. 1983)	7n, 13
Paynes v. *Lee*, 362 F. Supp. 797 (M.D. La. 1973), *aff'd per curiam*, 487 F.2d 1307 (5th Cir. 1974)	8n
Pillsbury Co. v. *Conboy*, 103 S. Ct. 608 (1983)	8-10, 17
Regan v. *New York*, 349 U.S. 58 (1955)	11n
Schlagenhauf v. *Holder*, 379 U.S. 104 (1964)	17n

PAGE

In re 620 Church Street Building Corp., 299 U.S. 24 (1936) 17n

Slochower v. *Board of Higher Education*, 350 U.S. 551 (1956) 10

Ullmann v. *United States*, 350 U.S. 422 (1956) 13

United States v. *Mackey*, 405 F. Supp. 854 (E.D.N.Y. 1975) 12n

United States v. *Nunez*, 668 F.2d 1116 (10th Cir. 1981) 11n

United States v. *Wilcox*, 450 F.2d 1131 (5th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972) 11n

United States Alkali Export Ass'n v. *United States*, 325 U.S. 196 (1945) 17n

Zenith Radio Corp. v. *Matsushita Electric Industrial Co.*, 494 F. Supp. 1190 (E.D. Pa. 1980), *aff'd in part and rev'd in part on other grounds*, No. 81-2333 (3rd Cir. Dec. 5, 1983) 14

Constitutional Provision:

U.S. Const. amend. V ..... *passim*

Law Reviews:

Morrison, *Commentary: Availability of Fifth Amendment Privilege Against Self-Incrimination and the Permissibility of Drawing Adverse Inferences: Alternative Perspectives*, 48 A.B.A. Antitrust L.J. 1421 (1979) 8n

Moxham, *A Comment Upon the Effect of Exercise of One's Fifth Amendment Privilege in Civil Litigation*, 12 New Eng. L. Rev. 265 (1965) 8n

Note, *Use of the Privilege Against Self-Incrimination in Civil Litigation*, 52 Va. L. Rev. 322 (1966) 8n

Rules: PAGE

Ark. Unif. R. Evid. 512 ..... 12n

Del. Unif. R. Evid. 512 ..... 12n

Mont. R. Evid. 505 ..... 12n

N.M. R. Evid. 513 ..... 12n

N.D.R. Evid. 512 ..... 12n

Proposed Fed. R. Evid. 513 11-12

U.S. Sup. Ct. R. 26 17

Vt. R. Evid. 512 ..... 12n

Statutes:

Judicial Code

28 U.S.C. § 1254(1) (1982) 2, 17
28 U.S.C. § 1292(b) (1982) 7-8, 14-16
28 U.S.C. § 1331 (1982) 3n
28 U.S.C. § 1337(a) (1982) 3n
28 U.S.C. § 1651(a) (1982) 2, 17n
28 U.S.C. § 2072 (1982) 11n

Neb. Rev. Stat. § 27-513 (1979) 12n

Nev. Rev. Stat. § 49.405 (1979) 12n

Okla. Stat. Ann. tit. 12, § 2513 (West 1980) 12n

Treatises:

C. McCormick, *Handbook of the Law of Evidence* (2d ed. 1972) 12n

2 J. Weinstein & M. Berger, *Weinstein's Evidence* (1982) 11n

Other Authorities:

Adoption of Fed. R. Evid., 56 F.R.D. 183 (1972) 11

ABA Standards, *The Defense Function*, § 7.6(c) 12n

C. Wright, *The Interlocutory Appeals Act of 1958*, 23 F.R.D. 199 (1959) 15n

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PETITION FOR A WRIT OF CERTIORARI OR, IN THE ALTERNATIVE, A COMMON LAW WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Opinions Below

The order and decision of the court of appeals are unreported and are set forth in the appendix at 1A, 2A. The orders and rulings of the district court and the magistrate are unreported and are set forth in the appendix at 8A-11A.

Jurisdiction

The order of the Court of Appeals for the Fifth Circuit denying leave to appeal pursuant to 28 U.S.C. § 1292(b) (1982) was entered on Janury 26, 1984. As demonstrated below, this Court has jurisdiction under 28 U.S.C. § 1254(1) (1982) or, in the alternative, 28 U.S.C. § 1651(a) (1982).

Constitutional and Statutory Provisions and Rules

Those portions of the Constitution, statutes, and rules of evidence involved herein (specifically the Fifth Amendment to the United States Constitution, sections 1292(b) and 1651(a) of title 28, and Proposed Rule of Evidence 513) are set forth in the appendix at 1S-2S.

Statement of the Case

The Litigation

These are 25 antitrust cases brought by some 75 corporate plaintiffs in various district courts and consolidated by the Judicial Panel on Multidistrict Litigation in the Eastern District of Louisiana for coordinated pre-trial proceedings. Individually and together they are among the largest and most complex private antitrust cases ever to have burdened the American judicial system. The industry in question is marine construction—the design, engineering, fabrication, and installation of offshore drilling and production platforms and pipelines used to recover and transport to land oil and gas located under the sea. Plaintiffs include the largest oil companies in the world.

The size and scope of the claims asserted are staggering. Plaintiffs allege that the prices for over 4,000 custom-built marine construction projects, done for them over a 25-year period throughout the world, were artificially inflated by defendants' alleged conspiracy to rig bids and otherwise re-

strain trade.[1] Some of the marine construction jobs in question bear individual price tags in the hundreds of millions of dollars. The total damages claimed are unspecified but could run into the billions of dollars.

Liability discovery is substantially complete,[2] and trial is scheduled to begin on February 4, 1985. Tens of millions of pages of documents have been produced and approximately 500 witnesses have been deposed on the liability issues alone. Substantial additional document production and many more depositions are anticipated on the damages issues. The district court has not yet determined whether all these cases will be tried together (as plaintiffs have requested), or whether there will be separate trials, either by geographic areas or by selecting a "bellwether" case to go first. Even the most expeditious of these alternatives will entail a complex trial which defendants estimate will take well in excess of six months to complete.

The Claims of Privilege and Plaintiffs' Proposed Use of Them

From the outset of the litigation it has been clear that a number of present and former employees of defendants—each of whom is acting on the advice of his own independent counsel—would assert their Fifth Amendment privilege not to

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1 Plaintiffs' principal allegations are that the defendants conspired to restrain trade and attempted to monopolize the marine construction industry in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982). Jurisdiction was predicated on sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, and on 28 U.S.C. §§ 1331 and 1337(a) (1982). The various complaints also include additional claims for purported violations of state statutory and common law arising out of the same general conduct asserted in the antitrust claims.

2 Most of these cases were commenced in 1979 following the return of an indictment in *United States* v. *J. Ray McDermott & Co., Inc., et al.*, 78 Crim. 422 (E.D. La. Dec. 14, 1978), and the acceptance of pleas of *nolo contendere*. The rest were commenced thereafter. After consolidation for pretrial purposes, *In re Marine Construction Antitrust Litigation*, 487 F. Supp. 1355 (J.P.M.D.L. 1980) (*per curiam*), coordinated discovery began in 1980.

testify about some or all aspects of the case. It has become equally clear that the plaintiffs plan to rely on these assertions as "evidence" at trial.

On twelve separate occasions plaintiffs' counsel were informed that a prospective deponent would, because of Fifth Amendment concerns, answer no questions at all at his deposition. Yet hour after hour, day after day, these witnesses were asked "wifebeating" questions which plaintiffs' counsel knew in advance would not be answered—questions such as "Mr. Rice, did you ever instruct any of your subordinates to stop colluding with McDermott?" Deposition of W. Rice, 1/21/83 at 73-74.[3] And when, to examining counsel's surprise, one witness changed his mind and offered to answer a question as to which he had previously asserted his privilege, counsel declined to put the question again, preferring the Fifth Amendment "answer", *see* Deposition of I. Foster, 3/15/83 at 100.

Plaintiffs have videotaped the depositions of those witnesses who invoked the Fifth Amendment (many of whom will be unavailable and beyond the court's jurisdiction at the time of trial) far more frequently than the depositions of witnesses not expected to invoke the privilege. Their obvious purpose is to present the assertions of privilege to the jury in the most vivid and prejudicial form. Indeed, in describing the case he expects to present at trial, plaintiffs' lead counsel has candidly admitted to the court that "the Fifth Amendment is obviously critically important to our plan." Transcript of 10/5/83 hearing before Judge Sear at 119 (hereinafter cited "Tr.").

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3 The following exchange is one of many other examples:

"Q. Mr. Gard, would you tell me whether any project that Brown & Root constructed for Tennessee Gas Pipeline Company during the period January 1, 1955, through at least December 31, 1975, was not subject to some collusion between Brown & Root and McDermott?"

Mr. Leonard: "Privilege."

"A. I assert my privilege under the 5th and 14th amendments."

(Deposition of W. Gard, 5/4/82 at 208)

The Proceedings Below

The district court, aware to a certainty that the Fifth Amendment issue would arise at trial and that an erroneous ruling on the law would necessitate reversal and a retrial, suggested that the issue be resolved by pretrial motion. The defendants accordingly moved, *in limine*, to preclude plaintiffs from introducing any such "testimony" and to preclude references before the jury to assertions of the privilege. After extensive briefing, the magistrate ruled on August 1, 1983, that Fifth Amendment assertions of non-party witnesses were inadmissible, stating:

> "[T]he invocation of the Fifth Amendment privilege by a present or former employee of a defendant is a right personal to the witness, and is or should be exercised without interference by the employer-defendant. Thus, the traditional rationale of respondeat superior, the ability of the employer to control the actions of the employee, evaporates in the context of a Fifth Amendment assertion by the employee. Furthermore, the assertion of the Fifth Amendment by non-party witnesses in this jury case will unfairly prejudice defendants with evidence that is of slight probative value." (10A).

Plaintiffs then appealed to the district court (Morey L. Sear, J.), who filed a minute entry on October 21, 1983 granting the motion for review and reversing the magistrate's ruling denying evidentiary use of assertions of the privilege. Judge Sear wrote:

> "The use of such evidence will be permitted upon a showing that the evidence is relevant and its probative value substantially outweighs the danger of unfair prejudice, confusion of the issues and is not misleading to the jury." (9A).

Defendants moved for reconsideration or, in the alternative, certification pursuant to 28 U.S.C. § 1292(b). The district court granted certification in a minute entry entered November

22, 1983 in which he identified the controlling issue of law as "the issue of evidentiary use at trial of Fifth Amendment assertions by non-parties" (8A). The district court cited, but did not recite the language of, section 1292(b) in granting the motion for certification. Defendants filed a petition for leave to take an interlocutory appeal within ten days of the entry of the order certifying the question to the court of appeals.

On January 26, 1984 the Court of Appeals for the Fifth Circuit denied defendants leave to appeal "for want of proper certification by the district court under § 1292(b)" based upon the district court's failure to recite the statutory prerequisites (2A, 4A). The court of appeals went on to conclude that the order was not an appropriate subject of an interlocutory appeal in any event because it did not properly present a controlling question of law.

Following the language of the district court's certification, defendants had framed the controlling question of law as "whether there may be evidentiary use at a jury trial of a non-party witness's invocation of the Fifth Amendment with the consequence that examining counsel can virtually manufacture evidence by asking questions before the jury to which he knows the witness will respond by invoking the Fifth Amendment." Petition for Permission to Take an Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) at 3. Yet the court of appeals held that this case presented no "clear-cut question of law against a background of determined and immutable facts" (6A) on the ground that:

> "A single answer could suffice only if the answer were either that an assertion of the fifth amendment by a non-party is never admissible in evidence under any circumstances, or that it is always admissible. If such evidence is admissible only under certain conditions, admissibility could not be determined without considering each set of conditions on its specific facts." *Id.*

But it is precisely defendants' position, as set forth in our petition to the court of appeals, that these Fifth Amendment

assertions by non-parties are not admissible in evidence "under any circumstances". We submit that the court of appeals erred in either refusing to recognize that clear-cut question of law or, worse yet, recognizing and resolving it *sub silentio* by concluding that admissibility depends on an assessment of the degree of the witness's "loyalty" to a party—all on a petition for leave to appeal without the benefit of briefing and argument.[4]

Reasons for Granting the Writ

I. The Lower Courts Have Mistakenly Interpreted *Baxter* v. *Palmigiano* to Permit an Inference of Guilt, and of Specific Facts, from the Invocation of the Fifth Amendment by Non-Parties.

In *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976), this Court permitted an adverse inference to be drawn from a party's silence in a civil, non-jury proceeding. *Baxter* has been relied upon by the Second,[5] and now the Fifth, Circuits as authority for the proposition that, in a jury trial, a non-party witness may be asked questions which counsel knows in advance the witness will "answer" by invoking his Fifth Amendment privilege—and that the jury may infer from this occurrence that the "facts" contained in counsel's question are true.[6] In doing so,

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4 The court of appeals recognized that the invocations of the privilege were "on the advice of [the witnesses'] own independent counsel" (3A). The magistrate and the district court had rejected, on the basis of defendants' factual showing, plaintiffs' contention that the invocations of the privilege had been influenced by defendants. Despite this, the court below indicated that the question of admissibility could not be decided absent a "factual showing" as to whether the witness was "disinterested" or had "continuing loyalty to the employer" (6A).

5 *Brink's Inc.* v. *City of New York*, 717 F.2d 700 (2d Cir. 1983). We are advised that the case has been finally concluded and no further proceedings are contemplated.

6 This view is by no means unanimous. *See* Judge Winter's well-reasoned dissent in *Brink's Inc.* v. *City of New York*, 717 F.2d 700, 714 (2d Cir. 1983), and the opinion of Judge Stern, captioned "dissenting" but actually concurring, in *Lionti* v. *Lloyd's Insurance Co.*, 709 F.2d

these courts have violated logic, misapplied *Baxter*, and ignored or overlooked this Court's holding last Term in *Pillsbury Co.* v. *Conboy*, ___ U.S. ___, 103 S. Ct. 608 (1983).

Baxter held simply that the evidentiary rule permitting the trier of fact to draw an adverse inference from a party's silence is applicable in a civil proceeding even though that silence was based on an invocation of the Fifth Amendment. There is nothing in *Baxter*—which speaks only of a "*party's silence*"—to support the proposition that a non-party may be brought before a jury, or his videotaped or transcribed deposition presented, for the express purpose of having that jury hear him invoke the Fifth Amendment and infer from that invocation the truth of the premises of the unanswered questions.

This procedure for smuggling contraband into the jury room is impermissibly prejudicial both because it is based on the logical fallacy that guilt may be inferred from Fifth Amendment silence (*see* pp. 10-11 below) and because it is impossible to cross-examine a witness who takes the Fifth. The latter obstacle to admissibility was examined in this Court's decision last Term in *Conboy*. There, an executive of one of the defendants in the *Corrugated Container Antitrust Litigation* had been granted immunity and had testified at length about price-fixing in a prior grand jury investigation. In the subsequent civil antitrust suits, the plaintiff-purchasers obtained the transcript of this grand jury testimony and read it to the

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237, 244 (3d Cir. 1983); *Depew* v. *Hanover Insur. Co.*, 73 F.R.D. 101, 103 (E.D. Tenn. 1976); *Paynes* v. *Lee*, 362 F. Supp. 797, 800 (M.D. La. 1973), *aff'd per curiam*, 487 F.2d 1307 (5th Cir. 1974); *Frierson* v. *McIntyre*, 151 F. Supp. 5, 6-7 (W.D. Va. 1953). *See also* Morrison, *Commentary: Availability of Fifth Amendment Privilege Against Self-Incrimination and the Permissibility of Drawing Adverse Inferences: Alternative Perspectives*, 48 A.B.A. Antitrust L.J. 1421 (1979); Moxham, *A Comment Upon the Effect of Exercise of One's Fifth Amendment Privilege in Civil Litigation*, 12 New Eng. L. Rev. 265 (1976); Note, *Use of the Privilege Against Self-Incrimination in Civil Litigation*, 52 Va. L. Rev. 322 (1966).

witness at his deposition, asking him whether he had "so testified". When he refused to answer, invoking the Fifth Amendment, the district court held him in contempt. The Seventh Circuit reversed.[7] This Court granted *certiorari* and affirmed the Seventh Circuit because the deposition testimony would have had to go beyond the immunized testimony and be subject to cross-examination barred by the Fifth Amendment in order to be admissible.

The Court pointed out that the grand jury transcripts themselves were inadmissible because the defendants had had no opportunity to cross-examine, 103 S. Ct. at 615 n.17, and that the same principle would apply to deposition testimony which simply affirmed that the prior testimony had been given, *id.* at 615 n.18. Accordingly, it held that the proposed deposition testimony would be inadmissible if defendants' right of cross-examination were curtailed by Fifth Amendment claims:

> "[E]ven if the direct examination is limited to the questions and answers in the immunized transcript, there remains the right of cross examination, a right traditionally relied upon expansively to test credibility as well as to seek the truth. Petitioners [the antitrust plaintiffs] recognize this problem, but maintain that the antitrust defendants 'would be entitled to test the accuracy and truthfulness of Conboy's repeated immunized testimony without going beyond the confines of that testimony.' Regardless of any limitations that may be imposed on its scope, however, cross examination is intended to and often will produce information not elicited on direct. We must assume that, to produce admissible evidence, the scope of cross examination at the deposition cannot easily

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7 A panel of the Seventh Circuit initially affirmed the district court's order. *In re Corrugated Container Antitrust Litigation, Appeal of John Conboy*, 655 F.2d 748 (7th Cir. 1981). On rehearing en banc, however, the full court vacated the panel decision and reversed the district court. 661 F.2d 1145 (7th Cir. 1981).

be limited to the immunized testimony." 103 S. Ct. at 615-16 (footnotes omitted).[8]

Allowing counsel to posit facts in a question to a non-party witness and allowing the jury to infer the truth of those assertions from the witness's invocation of the privilege permits the same evil which this Court condemned in *Conboy*, but in a more extreme form. Here, even though the question may have no basis in fact, the party against whom the Fifth Amendment "evidence" is offered is wholly deprived of cross-examination of that witness.

An even more fundamental difficulty with permitting evidentiary use of a witness's Fifth Amendment invocations (as distinguished from a party's silence) is that the invocation is simply not probative. Any view that it is probative rests on the assumption that it is logically valid to infer a witness's guilt from his invocation of the privilege. That is a popular fallacy, but a fallacy nonetheless. This Court has long recognized that one may properly choose to assert the privilege even though he has committed no crime. "The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." *Slochower* v. *Board of Education*, 350 U.S. 551, 557-58 (1956).[9] Since answering even an innocuous question may result in a waiver, when in doubt "prudent counsel" will advise the witness to assert his Fifth Amendment privilege. *Conboy*, 103 S. Ct. at 633 n.18 (Stevens, J., dissenting). Only

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8 Similarly, in his concurring opinion, Justice Marshall described it as "questionable whether the deposition testimony would be admissible at trial, in light of the limits that might have to be placed on cross-examination by the other civil litigants." 103 S. Ct. at 621 n.5. Dissenting, Justices Stevens and O'Connor also recognized that restrictions on the right of cross-examination might result in the deposition testimony being inadmissible. 103 S. Ct. at 633 n.17.

9 Professor Slochower was branded a "Fifth Amendment Commie" and summarily dismissed from the faculty of a state university when he invoked his privilege before the Internal Security Subcommittee of the Senate Judiciary Committee, popularly known as the McCarthy Committee.

the individual who claims the privilege, and his attorney, will normally know his reasons for doing so; others, including the witness's employer, will generally have no access to the individual's thought process—nor should they have.[10]

If the trial court's decision here is permitted to stand, employers faced with enormous liability based on their employees' Fifth Amendment invocations might well be tempted to extract a waiver of the privilege under pain of discharge or other sanction, a tactic long since rejected by this Court. *See Gardner* v. *Broderick*, 392 U.S. 273, 279 (1968) ("[T]he mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of loss of employment.").[11] Recognizing and respecting the individuals' rights, neither the petitioners here nor their attorneys have ever attempted to influence any deponent in these cases either to waive or to assert the privilege; on the contrary, as the court below recognized (3A), each witness who wished legal advice with respect to the privilege, and each witness who has claimed it, has been represented by, and acted upon the advice of, independent counsel of his own choosing.

In 1972 this Court adopted (by vote of eight to one) proposed Rule of Evidence 513. *See* 56 F.R.D. 183, 260 (1972). Congress declined to adopt the rule, but not on the basis of any substantive disagreement.[12] The proposed rule requires

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10 Courts have rejected *in camera* judicial review of a detailed factual basis for an individual's claim of privilege. *See United States* v. *Wilcox*, 450 F.2d 1131 (5th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972); *see also Hoffman* v. *United States*, 341 U.S. 479 (1951); *United States* v. *Nunez*, 668 F.2d 1116, 1121 (10th Cir. 1981).

11 *Cf. Regan* v. *New York*, 349 U.S. 58, 68 (1955) (Black, J., dissenting) ("Surely private employers are not now free to compel their employees to waive this and other constitutional privileges.").

12 Congress rejected all the proposed rules on privilege, largely because of the view that they might impinge on state-created rights and thus might be beyond the scope of the power granted by the Rules Enabling Act, 28 U.S.C. § 2072. Congress expressed no substantive disagreement with Proposed Rule 513, however. *See generally*, 2 J. Weinstein &

that knowledge of the claim of privilege be kept from the jury whenever possible; it prohibits comment by counsel upon a claim of privilege, and it entitles a party against whom the jury might draw an adverse inference to a curative instruction. The rule, in short, forbids precisely what plaintiffs seek to accomplish here.[13]

In a vigorous dissent in *Brink's Inc.* v. *City of New York*, 717 F.2d 700, 715-17 (2d Cir. 1983), Judge Winter, a former professor of evidence, surveyed the authorities on this issue, including Proposed Rule 513, and concluded that the exposure of a jury to a witness's assertion of the Fifth Amendment privilege in response to questioning calculated to elicit that response is "utterly without precedent in American law" and "an invitation to sharp practice". He reasoned that the breadth of the privilege, which extends to any answer "which would furnish a link in the chain of evidence needed to prosecute the claimant", *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951), renders its invocation inherently ambiguous so that its probative value "is derived entirely from the questions put by

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M. Berger, *Weinstein's Evidence* ¶ 501[01] at 501-12 (1982). The standards are viewed as a "convenient comprehensive guide to the federal law of privileges". *United States* v. *Mackey*, 405 F. Supp. 854, 858 (E.D.N.Y. 1975). Proposed Rule 513 has been enacted into law in substantially identical form in nine states. Ark. Unif. R. Evid. 512; Del. Unif. R. Evid. 512; Mont. R. Evid. 505; Neb. Rev. Stat. § 27-513 (1979); Nev. Rev. Stat. § 49.405 (1979); N.M. R. Evid. 513; N.D. R. Evid. 512; Okla. Stat. Ann. tit. 12, § 2513 (West 1980); Vt. R. Evid. 512. *See also* ABA Standards, The Defense Function § 7.6(c).

13 The complete text of proposed Rule of Evidence 513 is set forth *infra* at 2S. The same basic approach is reflected in the following comment:

> "It is submitted that the best solution is to recognize only privileges which are soundly based in policy and to accord those privileges the fullest protection. Thus, comment, whether by judge or counsel, or its equivalent of requiring the claim to be made in the presence of the jury, and the drawing of inferences from the claim, all would be foreclosed." C. McCormick, *Handbook of the Law of Evidence* § 76 at 156 (2d ed. 1972) (footnote omitted).

counsel", which are not subject to cross-examination. *Brink's*, 717 F.2d at 715.

Similar views were expressed by Judge Stern in his opinion (captioned dissenting but actually concurring) in *Lionti* v. *Lloyd's Insurance Co.*, 709 F.2d 237, 244 (3d Cir. 1983). Judge Stern added that an exception, attributing evidential value to a *party's* refusal to testify in civil proceedings, might be justified as a "transaction cost of litigation whose potential harshness is mitigated by the ability of a party, through counsel, to explain and control the contours of his invocation." *Id.* at 246. No such exception is justified, he stated, when a witness invokes the privilege on his own (as is the case here).

We respectfully submit that the clear teaching of this Court on the meaning of the Fifth Amendment privilege has been forgotten and needs to be reiterated:

> "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States." *Ullmann* v. *United States*, 350 U.S. 422, 426-27 (1956) (footnotes omitted).

II. It is Imperative That the District Court's Ruling be Reviewed Now to Prevent the Massive Waste of Resources, and the Negative Reflection on the Judicial Process, That a Retrial Would Entail.

These actions constitute what is quite probably the largest and most complex private antitrust litigation in history. Just one of these cases will take many months to try, and the district court is considering (at plaintiffs' request) a consolidated trial of all twenty-five. If the district court erred in its ruling on the motion *in limine*, no verdict for plaintiffs could possibly survive and a retrial would clearly be required. It was to avert such a massive waste of resources—of the courts, the jurors, the parties and the witnesses—that the district court conscien-

tiously sought guidance by certifying its Fifth Amendment decision pursuant to 28 U.S.C. § 1292(b). For that reason, the court of appeals should have accepted the appeal and provided the guidance sought. For the same reason, as well as because of the basic importance and recurring nature of the substantive issue involved, this Court should grant the writ and decide the question on its merits.

As the district court apparently recognized, this was the paradigmatic case for an interlocutory appeal under section 1292(b). There will be a trial, or trials, in these actions of monumental proportions. Retrial, or retrials, should be avoided by all possible means; the whole purpose of the Interlocutory Appeals Act was to eliminate such judicial waste. As Judge Becker noted in the *Japanese Electronic Products Antitrust Litigation* (M.D.L. 189), "the certification procedure of 28 U.S.C. § 1292(b) was intended specifically to expedite the disposition of 'big' cases like M.D.L. 189", *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 494 F. Supp. 1190, 1243-45 (E.D. Pa. 1980), *aff'd in part and rev'd in part on other grounds,* No. 81-2333 (3rd Cir. Dec. 5, 1983).[14]

The court of appeals here paid lip service to the utility of interlocutory appeals even as it subverted section 1292(b) by resort to empty formalities. Although noting "the value that across-the-board [evidentiary] determinations may have in preparing complex consolidated cases for eventual trial", and stating that it "would interpret § 1292(b) liberally to attempt to accomplish better preparation of such cases for trial" (7A), it

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14 It is well settled, in the Fifth Circuit and elsewhere, that an issue need not be dispositive to merit certification under section 1292(b). *See, e.g., Garner* v. *Wolfinbarger,* 430 F.2d 1093, 1097 (5th Cir. 1970), *cert. denied,* 401 U.S. 974 (1971) (Review is available if the issue is important and "would affect the scope of the evidence in a complex case, even short of requiring complete dismissal."); *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir.) (en banc), *cert. denied,* 419 U.S. 885 (1974) ("A controlling question of law must encompass at *the very least* every order which, if erroneous, would be reversible error on final appeal.") (emphasis added).

denied leave to appeal because the district court had not recited the text of section 1292(b) in its order granting certification (2A).

The district court's order, however, was entered after consideration of memoranda from both sides which fully addressed the propriety of certification in accordance with the statutory criteria, and the order explicitly set forth the legal issue certified.[15] The district judge was thus clearly aware of the criteria for certification and, in granting the motion for "certification for an immediate appeal pursuant to 28 U.S.C. § 1292(b)", obviously incorporated them by reference and certified that they had been satisfied.[16]

Even if the court of appeals has discretion to establish more formal standards for section 1292(b) certification by district courts in the Fifth Circuit prospectively, it was improper to do so retroactively in order to avoid the merits of this petition,[17]

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15 The order states: "Defendants' motion for certification for an immediate appeal pursuant to 28 U.S.C. § 1292(b) on *the issue of evidentiary use at trial of Fifth Amendment assertions by non-parties* is GRANTED." (8A) (emphasis added).

16 Indeed, Judge Sear had good reason to believe that his reference to § 1292(b) was sufficient since he had previously certified an order in a related case in a similar fashion, *see Ingram Corp.* v. *J. Ray McDermott,* Docket No. 79-2575 (E.D. La. Nov. 2, 1981), and the court of appeals, without comment, had granted leave to appeal. *See Ingram Corp.* v. *J. Ray McDermott & Co.*, Docket No. 81-9828 (5th Cir. Feb. 19, 1982). At that time the court of appeals stated that its docket was not too congested to hear the appeal. *See generally Ingram Corp.* v. *J. Ray McDermott & Co.*, 698 F.2d 1295, 1309 n.24 (5th Cir. 1983).

17 *See, e.g., In re Heddendorf,* 263 F.2d 887, 890 (1st Cir. 1959):

> "We shall not deny the present application for leave to appeal merely upon the absence of an express certificate by the district court as required by § 1292(b), as amended. For present purposes we shall assume, without deciding, that the district court's certificate is sufficient, on the ground that its citation of the statute might perhaps be treated as a 'shorthand' form of the required findings."

As Professor Wright has written, certification such as the one here should be regarded a sufficient because "[i]t would be contrary to the entire tenor of modern federal procedure to disregard the certification

and then to further foreclose review by indicating that the trial court ought not to issue a certificate complying with these newly announced requirements. The Fifth Circuit's action in these cases is not a mere technical error but a major lapse in judicial administration. Unless corrected before trial, it will permit plaintiffs to succeed in their plan of obtaining a judgment in the billions by using Fifth Amendment invocations as highly prejudicial "evidence" of the broadest and most expansive liability their counsel can imagine.[18] If that kind of trial is permitted in these cases, any invocation of the Fifth Amendment in a civil case hereafter will be highly expensive to the invoker's employer or former employer (who has no say in the matter) and a gold mine for opposing counsel.

The denial of leave to appeal by the court of appeals may raise some doubt as to whether these cases are "in" the court

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. . . in question, the purpose of which is so apparent, merely because the precise words of the statute were not used." C. Wright, *The Interlocutory Appeals Act of 1958*, 23 F.R.D. 199, 208 (1959).

18 Judge Sear indicated at argument that he would permit use of Fifth Amendment "evidence" precisely where there is *not* any other evidence on the issue framed in the examiner's questions:

> "THE COURT: . . . I think we now have to divide our issues to those in which you have some form of tangible evidence that would establish the facts, as opposed to those instances or issues in which you're unable by any other means [other than use of the Fifth Amendment invocations as evidence] to establish the fact."
>
> • • •
>
> "Well, do you agree then, Mr. McInerney [counsel for defendants] that . . . where the evidence does not exist in any other form, that a former employee, who is called to testify about events occurring during his employment, would be appropriate, and that a jury would be entitled to know, at least to some extent, that he invokes the Fifth Amendment?"
>
> MR. MCINERNEY: I would not, Your Honor . . . ."
>
> • • •
>
> "[M]y point is that the practice is even more pernicious if the questioner can make up out of whole cloth evidence that doesn't exist anywhere else." Tr. at 63.

of appeals for the purposes of this Court's jurisdiction under 28 U.S.C. § 1254(1). Accordingly, petitioners seek not only the statutory writ but, in the alternative, a common law writ of certiorari to the court of appeals to review its action in denying leave to appeal, and review of the district court's ruling on the motion *in limine*.[19] We recognize that this Court exercises its common law certiorari jurisdiction "sparingly", Sup. Ct. R. 26, but submit that all of the circumstances here combine to make this is a compelling case for granting that writ.[20]

The specter of having to try these unprecedently complex cases twice or even more, the poor reflection on our judicial system that would result, the likelihood that the courts below have badly misinterpreted this Court's decisions in *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976), and *Pillsbury Co.* v. *Conboy*,

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19 It is clear that the Court may review the merits of the underlying question. In similar contexts involving discretionary appeals to the court of appeals, this Court has stated that the All Writs Act, now 28 U.S.C. § 1651(a), empowers it to grant a "writ of certiorari to review the action of the court of appeals in declining to allow an appeal to it", and to review not only the court of appeals' exercise of discretion in denying leave to appeal but the merits of the underlying petition. *House* v. *Mayo*, 324 U.S. 42, 44 (1945); *accord, In re 620 Church Street Building Corp.*, 299 U.S. 24 (1936) (reaching merits on common law writ of certiorari to review denial of leave to appeal). And in *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964), this Court reviewed both the court of appeals' denial of mandamus and the district court's order requiring the defendant to submit to physical examination under Rule 35. Although the court of appeals had not reviewed the district court's determination that there was "good cause" for the examination this Court did so, vacated the order of the court of appeals, and remanded the case to the *district court*.

20 Although the procedural context is different, this case, like *United States Alkali Export Assn.* v. *United States*, 325 U.S. 196, 203-04 (1945), "is not the ordinary one of hardship resulting from . . . denying a preliminary motion". There, "[t]he hardship imposed on petitioners by a long-postponed appellate review" sufficed, when coupled with an additional factor, to warrant review by common law certiorari. Here, the hardship is even greater and there are a number of additional factors which justify granting the writ.

103 S. Ct. 608 (1983), and the likelihood that this "invitation to sharp practice" will spread contagiously if not corrected promptly—all argue for the issuance of the writ which, in these cases, is not only appropriate but essential to sound judicial administration.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

Order of the Fifth Circuit, Filed January 26, 1984

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-9195

USDC #MDL 417

IN RE: MARINE CONSTRUCTION ANTITRUST LITIGATION,
M.D.L. Docket No. 417,

BROWN & ROOT, INC., ET AL.,

Petitioners,

—versus—

EXXON CORPORATION, ET AL.,

Respondents.

On Application for Leave to Appeal from
an Interlocutory Order

Before:

RUBIN, JOLLY and DAVIS,

Circuit Judges.

BY THE COURT:

IT IS ORDERED that leave to appeal from the interlocutory order of the United States District Court for the Eastern District of Louisiana entered on November 22, 1983, is DENIED.

Memorandum of Decision of the Fifth Circuit, filed January 26, 1984

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-9195

IN RE: MARINE CONSTRUCTION ANTITRUST LITIGATION, M.D.L. Docket No. 417.

BROWN & ROOT, INC., ET AL.,
Petitioners,

versus

EXXON CORPORATION, ET AL.,
Respondents.

On Application for Leave to Appeal from an Interlocutory Order

Before:

RUBIN, JOLLY and DAVIS,
Circuit Judges.

BY THE COURT:

The petition for leave to appeal a pretrial ruling concerning the admissibility of evidence in a massive consolidated civil antitrust case, involving approximately twenty-five suits by approximately seventy-five plaintiffs,[1] is denied for want of

1 The cases were consolidated for pretrial proceedings by the Judicial Panel on Multidistrict Litigation in the Eastern District of Louisiana, M.D.L. Docket No. 417.

proper certification by the district court under § 1292(b). Because the district court has the power to issue a correct certification, we also discuss the criteria to be considered in such a case.

During discovery twenty-six present and former employees of the defendants, none of whom is a party to this litigation, and each of whom acted on the advice of his own independent counsel, asserted their privilege against self-incrimination under the fifth amendment and refused to testify in response to some or all questions about the case. The defendants assumed, with justification, that the witnesses would again invoke the privilege if called at the trial. The district court suggested that the issue of the use, if any, that may be made of a non-party witness's claim of fifth amendment privilege, should be resolved well before trial.

The defendants moved *in limine* to bar introduction of any testimony that a witness had invoked the privilege and to preclude reference before the jury to any assertion of the privilege. After considering a magistrate's recommendation that the motion be granted, the district court ruled:

> The use of such evidence will be permitted upon a showing that the evidence is relevant and its probative value substantially outweighs the danger of unfair prejudice, confusion of the issues and is not misleading to the jury.

Appeals from interlocutory orders, save a few specially permitted, were not allowed until 1958. Section 1292(b), adopted by Congress at the recommendation of the Judicial Conference, represents a "departure from the republic-old final judgment rule." 9 *Moore's Federal Practice*, ¶ 110.22[1]. Because certification of a question for interlocutory appeal is exacted by statute, we look first to the district court's certificate.

Memorandum of Decision of the Fifth Circuit, filed January 26, 1984

The requirements of § 1292(b) are explicit:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, *he shall so state in writing in such order.* . . . (Emphasis added.)

Aside from a reference to the legal question involved, the district court's certificate states none of the statutory prerequisites. It recites only "that Defendants' motion for certification for an immediate appeal pursuant to 28 U.S.C. § 1292(b) on the issue of evidentiary use at trial of Fifth Amendment assertions by non-parties is granted."

"Unless the district judge appends the statutory statement, an appeal cannot be supported by § 1292(b)." 9 *Moore's Federal Practice*, ¶ 110.22[3]. The section applies only when the district court "has certified in writing that the criteria for availability [sic] of an interlocutory order are met." *Association of Co-Op Members* v. *Farmland Industries*, 684 F.2d 1134, 1137 n.3 (5th Cir. 1982) (dicta), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1428, ____ L.Ed.2d ____(1983).

The certificate is not boilerplate. The requirement that the district court make an initial determination of appealability was not included in the original Judicial Conference proposal. It was added at the suggestion of Chief Judge Charles E. Clark of the Second Circuit, and "deliberately adopted to secure an initial judgment on the desirability of appeal by the trial judge as the person most immediately familiar with the litigation." 16 C. Wright, A. Miller, E. Cooper, E. Gressman, *Federal Practice & Procedure*, § 3929, p. 138 (hereinafter cited as Wright & Miller). The district judge is in the best position initially to determine not only what the controlling question is and

whether there is substantial ground for difference of opinion concerning it, but also whether its resolution will materially advance termination of the litigation. In the absence of a certification making these determinations, we dismiss the appeal.

The district court certificate may be amended at any time to include the prescribed statement. Fed. R. App. P. 5. For the consideration of the district judge, should application for an amended certificate be made, we discuss whether there is at this time a controlling question of law, an issue briefed by the parties.

The answer to the question attempted to be presented is governed solely by the Federal Rules of Evidence. The appellants do not suggest that the Fifth Amendment would be violated by the admission of the non-parties' assertion of their privilege. A party's invocation of the privilege may be considered against him in a civil case.[2] In an opinion captioned "dissenting" (but actually concurring in the result) in *Lionti* v. *Lloyd's Ins. Co.*, 709 F.2d 237, 244 (3d Cir. 1983), Judge Stern agreed that a party's own invocation of the privilege might warrant an inference against him because "a party, through counsel, [has the ability] to explain and control the contours of his invocation." *Id.* at 245. But he asserted that it would be unfair to allow an inference against a party "when a mere witness, with no stake in the matter, invokes privilege. . . . While a party may be able to deflect the damage of adverse inferences taken from his own invocation through, for example, rehabilitating examination by his counsel, he is unable to defend against an adverse inference drawn against a witness which in turn harms his own case." *Id.*

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2 *Baxter* v. *Palmigiano*, 425 U.S. 308, 98 S.Ct. 1551, 47 L.Ed.2d 810 (1976); *Wehling* v. *CBS*, 611 F.2d 1026, 1027 (5th Cir. 1980). *But cf. Paynes* v. *Lee*, 362 F.Supp. 797 (M.D. La. 1973), *aff'd*, 487 F.2d 1307 (5th Cir. 1974) (barring aeverse inference in civil case because of unusual circumstances, *i.e.*, extremely volatile racial climate).

Memorandum of Decision of the Fifth Circuit, filed January 26, 1984

Even if one adopts Judge Stern's thesis, it is impossible to determine without some sort of factual showing which, if any, of the twenty-six potential witnesses, each of whom is a present or former employee of one of the defendants, is as disinterested as his criterion would require.[3] The district court has not finally decided that any evidence will be admitted or excluded. He has simply decided that some evidence of this kind may be admitted after the trial court balances probative value against prejudice as required by Rule 403, Fed. R. Evid.

The § 1291(b) [sic] order must involve a "clear-cut question of law against a background of determined and immutable facts. For that reason such matters as the sufficiency of pleadings and pre-trial rulings as to the admissibility of evidence are not ordinarily certifiable." 9 *Moore's Federal Practice*, ¶ 110.22[2] at 261 (footnotes omitted), *quoted with approval in Pollock & Riley, Inc.* v. *Pearl Brewing Co.*, 498 F.2d 1240, 1246 (5th Cir. 1974).

Certification of an interlocutory question is not a device for obtaining a dissertation concerning issues that may arise at trial. Reviewing the cases, Wright & Miller say, "a few cases have dealt with pretrial rulings that purport to control the evidence that may be offered at trial. The general view appears to be that such rulings are not ripe for review, since the course of trial may lead to a different ruling." 16 Wright & Miller, *supra*, § 3931, at 171 (footnote omitted).

As the "controlling issue" is stated in the present certificate, its answer would require a broad advisory opinion rather than a specific reply to a specific legal question. A single answer

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3 *Cf.* Heidt, *The Conjurer's Circle—The Fifth Amendment Privilege in Civil Cases*, 91 Yale L.J. 1062, 1119 & n.214 (1982) (suggesting that fifth amendment invocations by present employees be treated as vicarious statements of defendant employer; statements by former employees should be treated similarly if there are indications of continuing loyalty to employer).

could suffice only if the answer were either that an assertion of the fifth amendment by a non-party is never admissible in evidence under any circumstances, or that it is always admissible. If such evidence is admissible only under certain conditions, admissibility could not be determined without considering each set of conditions on its specific facts.[4] Some of the conditions on which we are asked to express an opinion may never arise. There is nothing in the record to indicate which questions and responses concerning fifth amendment pleas, if any, the trial court proposes to admit at trial or how it will evaluate their probative value, how that court will balance probative value against unfair prejudice, or how it will instruct the jury concerning the jury's consideration of any answer that might be allowed.

We have held that a pretrial ruling excluding evidence is "not one that presents a controlling question of law or one that can possibly advance the ultimate termination of the litigation." *Pollock & Riley, supra*, 498 F.2d at 1246. When such an evidentiary issue becomes " 'ripe,' the district court trying the case will have the benefit of all factual proof governing the question of relevancy." *Id., quoting Control Data Corp.*, 421 F.2d at 327. When the pretrial ruling proposes the admission of evidence under a test yet to be applied, the same considerations are relevant.

Like the district judge, we are aware of the value that across-the-board determinations may have in preparing complex consolidated cases for eventual trial and would interpret § 1292(b) liberally to attempt to accomplish better preparation of such cases for trial. However, at this juncture and on the record now before us, the effort appears to be at the best premature.

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4 *Cf. Control Data Corp.* v. *International Business Machines Corp.*, 421 F.2d 323, 326-27 (8th Cir. 1970) (refusing to accept interlocutory appeal from order prohibiting reference at trial to consent decrees that had been entered against antitrust defendant).

Order of the District Court Granting Motion for Certification, dated November 22, 1983, filed November 22, 1983

MINUTE ENTRY
SEAR, J.
November 22, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

M.D.L. DOCKET

No. 417

SECTION "G"

IN RE:

MARINE CONSTRUCTION ANTITRUST LITIGATION

IT IS ORDERED that Defendants' motion for certification for an immediate appeal pursuant to 28 U.S.C. § 1292(b) on the issue of evidentiary use at trial of Fifth Amendment assertions by non-parties is GRANTED.

IT IS FURTHER ORDERED that under no conditions will this appeal delay the trial of this matter. Trial will proceed as scheduled even if the Court of Appeals has not rendered a decision on this issue by that date.

MOREY L. SEAR
United States District Judge

Order of the District Court on the Admissibility of Non-Party Witnesses' Fifth Amendment Invocations, dated October 20, 1983, filed October 21, 1983

MINUTE ENTRY
SEAR, J.
OCTOBER 20, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

M.D.L. DOCKET NO. 417

MARINE CONSTRUCTION ANTITRUST LITIGATION

ALL CASES

IT IS ORDERED that the Magistrate's order denying plaintiffs' motion seeking admission of the D. R. Ward dairy [sic] excerpts as business records is affirmed.

IT IS FURTHER ORDERED that defendants' motion for review of the Magistrate's order denying use of the claim of Fifth Amendment privilege is granted, and the Magistrate's order is reversed. The use of such evidence will be permitted upon a showing that the evidence is relevant and its probative value substantially outweighs the danger of unfair prejudice, confusion of the issues and is not misleading to the jury.

IT IS FURTHER ORDERED that defendants' motion for partial summary judgment is denied.

MOREY L. SEAR
United States District Judge

Ruling of the Magistrate on the Admissibility of Witnesses' Fifth Amendment Invocations, dated August 1, 1983, filed August 1, 1983

MINUTE ENTRY
AUGUST 1, 1983
SHAVER, M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

M.D.L. DOCKET NO. 417

SECTION "G" (4)

IN RE:

MARINE CONSTRUCTION ANTITRUST LITIGATION

RULING ON MOTIONS

1. DEFENDANTS' MOTION IN LIMINE EXCLUDING THE USE AT TRIAL OF FIFTH AMENDMENT CLAIMS

GRANTED as to non-party witnesses; DENIED as to parties.

The Fifth Amendment does not forbid an adverse inference against a party to a civil action who refuses to testify in response to probative evidence offered against him. *Baxter* v. *Palmigiano*, 425 U.S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976). However, the invocation of the Fifth Amendment privilege by a present or former employee of a defendant is a right personal to the witness, and is or should be exercised without interference by the employer-defendant. Thus, the traditional rationale of respondeat superior, the ability of the employer to control the actions of the employee, evaporates in

Ruling of the Magistrate on the Admissibility of Witnesses' Fifth Amendment Invocations, dated August 1, 1983, filed August 1, 1983

the context of a Fifth Amendment assertion by the employee. Furthermore, the assertion of the Fifth Amendment by non-party witnesses in this jury case will unfairly prejudice defendants with evidence that is of slight probative value. *Farace* v. *Independent Fire Insurance Co.*, 699 F.2d 204 (5th Cir. 1983).

2. PLAINTIFFS' MOTION SEEKING ADMISSION INTO EVIDENCE OF D. R. WARD'S DIARIES AS BUSINESS RECORDS

DENIED. The requirements of Rule 803(6), Federal Rules of Evidence, are not met without the testimony of the custodian or other witness as follows:

> (1) that the record sought to be admitted is a record of acts, events, conditions and opinions made at or near the time by, or from information transmitted by, a person with knowledge;
>
> (2) that the record was kept in the course of a regularly conducted business activity; and
>
> (3) that it was the regular practice of the business activity to make the record sought to be introduced.

Pretermitting the question whether the requirements of Rule 803(6) can ever be satisfied without testimonial evidence, I find that in the circumstances of this case, plaintiffs' efforts to qualify the diaries, either by cross-referencing entries or by comparison with other documents, are insufficient to establish the required indicia of trustworthiness. This ruling is without prejudice to plaintiffs' right to seek admission of the diaries on some other basis.

EILEEN GLEASON SHAVER
United States Magistrate

APPENDIX OF CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

Constitutional Provision

The Fifth Amendment to the United States Constitution provides, in part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

Statutory Provisions

Section 1292(b) of the Judicial Code, 28 U.S.C. § 1292(b), provides:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

Section 1651(a) of the Judicial Code, 28 U.S.C. § 1651(a) provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Rules

Proposed Rule of Evidence 513, 56 F.R.D. 183,260 (1972) (not adopted by Congress) provides:

> "(a) *Comment or inference not permitted.* The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.
>
> "(b) *Claiming privilege without knowledge of jury.* In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.
>
> "(c) *Jury Instruction.* Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom."